86-976

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

LEON CARNAL CAREY,

Respondent.

PETITIION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL,
STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

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December 9, 1986.

QUESTIONS PRESENTED

Where a suspect, following advisement of rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), makes an ambiguous or equivocal response to a waiver question, cases are in conflict regarding the consequences of the response and what constitutes permissible police questioning thereafter.

The questions presented are:

1. Where a trial court finds that a response was ambiguous and permitted clarifying questions which revealed that the suspect was not invoking Fifth Amendment rights, may an appellate court reach a contrary result based on an independent review of a record that is susceptible to more than one reasonable interpretation?

2. Where both a trial and appellate court acknowledge that an interrogating

officer had a good faith belief that a suspect's response to a waiver question required clarification, and acting on that belief the officer obtained a waiver of rights and subsequent incriminating statements, must evidence of the statements be excluded upon a judicial finding that the officer's good faith belief was mistaken, even though the statements were otherwise voluntary?

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List of Parties

The parties to the proceedings below were petitioner the People of the State of California, and respondent Leon Carnal Carey. Both parties are before this Court.

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IN THE

SUPREME COURT OF THE UNITED STATES

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THE PEOPLE OF THE STATE OF CALIFORNIA,

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PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL,
STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

Petitioner, the People of the State of California, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, entered in the above-entitled proceeding on

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July 7, 1986, and in which review was denied by the California Supreme Court on October 23, 1986.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, is reported at 183 Cal.App.3d 99, 227 Cal.Rptr. 813, and is reprinted in the appendix hereto, page A1, infra.

The order of the California Supreme Court denying petitioner's Petition for Review is unreported. It is reprinted in the appendix hereto, page A16, infra.

JURISDICTION

The judgment of the Court of Appeal of the State of California, Second Appellate District, was entered on July 7, 1986, reversing respondent's conviction dated October 7, 1985. Thereafter, on October 23, 1986, the Supreme Court of California denied

a timely petition for review.

The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of

law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment XIV, in relevant part:

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

". . . ."

STATEMENT OF THE CASE

Respondent, who was described by the Court below as "a one man crime wave," was convicted in Santa Barbara County, California, of forcible rape in violation of California Penal Code section 261.2, forcible rape with a foreign object in violation of California Penal Code section 289(a), forcible oral copulation in violation of California Penal Code section 288a(c), assault with great bodily injury in violation of California Penal Code sections 245(a) and 12022.7, robbery in violation of California Penal Code section 211, robbery of an inhabited dwelling in violation of California Penal Code section 213.5, two counts of grand theft from a person in violation of California Penal Code section 487.2, burglary in violation of California Penal Code section 459, two counts of attempted burglary in violation of California Penal Code sections

459 and 664, and receiving stolen property in violation of California Penal Code section 496. He was sentenced to state prison for a total term of 25 years, 8 months, which included an enhancement based on respondent's having previously been convicted of a felony. (R.T. pp. 393-397.)[1/]

Respondent appealed his conviction to the California Court of Appeal, contending that his post-arrest statements were improperly admitted at trial in violation of Miranda v. Arizona, 384 U.S. 436 (1966). The statements at issue were obtained shortly after respondent's arrest for robbery. He was taken to the Santa Barbara Police Department where Detective Neil Sharpe advised him of his constitutional rights as required by Miranda v. Arizona, supra. When asked if he

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1. "RT" refers to the "Reporter's Transcript" of the trial court proceedings which was included as part of the record on appeal.

understood each of his rights, respondent said, "Yes." Detective Sharp then said, "Having these rights in mind, do you wish to talk to me now?" Respondent replied, "I ain't got nothin' to say." Detective Sharpe, believing the answer to be ambiguous, asked respondent if he meant that he did not know what to say or would answer questions. Instead of replying to the detective's inquiry, respondent repeated his first statement that he had nothing to say and, when Detective Sharpe indicated that he did not understand what he meant, respondent repeated his response twice more. Detective Sharpe then rephrased his clarifying questions and asked, "How about if I asked you questions? Would you have some response to those?" Respondent answered, "It all depends on the questions." Detective Sharpe then told respondent he could answer just those questions that he thought he could.

Thereafter, substantive questioning commenced and respondent made incriminating statements. (People v. Carey, supra, 183 Cal.App.3d 99, 103-104, 227 Cal.Rptr. 813, 814-815 (1986).)

At a hearing held on the admissibility of the statements, Detective Sharpe testified, without contradiction, that he had not understood what respondent had meant when he said he had nothing to say. (R.T. pp. 194-195.) The trial court found that the Detective had correctly perceived an ambiguity and that Detective Sharpe appropriately asked clarification questions, which led to respondent's voluntary statements. (R.T. pp. 345-346.)

The California Court of Appeal, in a published opinion filed July 7, 1986, acknowledged Detective Sharpe's unchallenged preception of an ambiguity. (People v. Carey, supra, 183 Cal.App.3d at p. 105, fn. 5, 227 Cal.Rptr. at p. 816, fn. 5.) However, the

court overturned the trial court's findings that the responses required clarification and further held that Miranda v. Arizona, supra, demanded that all questioning, including clarifying questions, cease when respondent said he had nothing to say. (People v. Carey, supra, 183 Cal.App.3d at pp. 104-106, 227 Cal.Rptr. at pp. 815-816.)

Petitioner, the People of the State of California, sought review in the California Supreme Court, contending that Miranda v. Arizona, supra, permits clarifying questions that do not portend to develop the facts under investigation where an officer acting in good faith perceives that a suspect has made an ambiguous response to a waiver question. Petitioner also contended that the California Court of Appeal improperly overturned the factual findings that, in the context of the conversation, respondent's answers were ambiguous. The California

Supreme Court denied review on October 23, 1986.

On November 6, 1986, the California Court of Appeal granted Petitioner's Motion to Stay Issuance of the Remittitur pending disposition of the matter by the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

I

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE STATES AND BETWEEN THE STATES AND FEDERAL COURTS REGARDING THE STANDARDS FOR DETERMINING THE CONSEQUENCES OF A SUSPECT'S AMBIGUOUS RESPONSE FOLLOWING A MIRANDA ADMONITION

A. Miranda v. Arizona Permits Clarifying Questions When a Suspect's Responses Following Admonition of Rights Are Ambiguous; However, Cases Are in Conflict Regarding the Standards For Determining the Consequences of an Ambiguous Response.

"Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is,

of course, admissible in evidence." (Miranda v. Arizona, 384 U.S. 436, 478 (1966).)

Two decades ago when this Court rendered its decision in Miranda v. Arizona, supra, it did so in the context of a philosophy that, while involuntary confessions are constitutionally unacceptable, the admission of a suspect's statement that is the product of free will is an acceptable and useful tool of law enforcement. Therefore, when a suspect invokes his or her Fifth Amendment rights, questioning must cease. But where a suspect makes an ambiguous reply to a waiver question, the officer does not violate the Fifth Amendment by asking non-substantive clarifying questions. Indeed, in the Miranda Opinion, this Court approved of FBI procedures which allow an interviewing agent to resolve perceived ambiguities. (Miranda v. Arizona, supra, at pp. 483-486.) Absent

evidence of coercion, federal courts generally uphold FBI agents' conclusions that a suspect has waived Fifth Amendment rights. (Id.; see Hiram v. United States, 354 F.2d 4 (9th Cir. 1965).) Recently, in Smith v. Illinois, 469 U.S. 91 (1984), this Court had occasion to discuss procedures to be employed following an accused's request for counsel during custodial interrogation. This Court noted that such requests may be ambiguous or equivocal, and that "courts have developed conflicting standards for determining the consequences of such ambiguities." (Id., at p. 95.) Those conflicting approaches fall into three categories: (1) jurisdictions which demand that all questioning cease no matter how ambiguous or equivocal the request for or reference to counsel;
(2) jurisdictions that attempt to define a threshold standard of clarity for such requests which must be reached in order to

constitute an invocation of the right to counsel; and, (3) jurisdictions that allow narrow clarification questions to resolve an arguable ambiguity. (Smith v. Illinois, supra, at p. 96, fn. 3, and cases cited therein.) The conflict was not resolved in Smith v. Illinois, because this Court held that the judgment must be reversed irrespective of the standard applied. (Id., at p. 96.)[2/]

Petitioner submits that this conflict among jurisdictions merits resolution by this Court. A core virtue of Miranda v. Arizona is that it affords law enforcement clear

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2. Smith v. Illinois did not involve an ambiguity. During advisement of his rights, the suspect indicated a desire for counsel. However, the interrogating officer continued the admonishment and, thereafter, Smith agreed to talk. This Court held that the "postrequest responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself." (Smith v. Illinois, supra, at p. 100.)

guidance on the manner in which to conduct a custodial interrogation. (Fare v. Michael C., 439 U.S. 1310, 1314 (1978) (Rehnquist, Circuit Justice, in chambers on application for stay).) This virtue is seriously compromised by the conflicting, and often poorly defined, standards for law enforcement to follow when there is a perceived ambiguous response to a waiver

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question.[3/]

As heretofore noted, some jurisdictions demand that all questioning cease no matter how ambiguous or equivocal the request for or reference to counsel. In People v. Superior Court (Zolnay), 15 Cal.3d 729, 735-736, 125 Cal.Rptr. 798, 802-803 542 P.2d 1390,

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3. Ambiguities may occur in the manner in which an accused responds to a waiver question concerning the right to counsel (as discussed in Smith v. Illinois, supra, at p. 96, fn. 3), and in the manner in which an accused responds to a waiver question concerning the right to remain silent (as presented in the instant case). For Miranda purposes, it is a difference without a distinction. Miranda v. Arizona was decided under the Fifth Amendment and held, in effect, that a request for counsel during custodial interrogation was an invocation of a Fifth Amendment right, as made applicable to the states by the Fourteenth Amendment. (Miranda v. Arizona, supra, at pp. 469-470; see also pp. 536-537 (White, J., dissenting).) Thus, an ambiguous or equivocal response to either waiver question calls for analysis of the same constitutional right and presents the same dilemma to the questioner regarding what subsequent approach to take.

1394-1395, cert. denied 429 U.S. 816 (1976), the California Supreme Court held that the statements "Do you think we need an attorney?" or "I guess we need a lawyer" invoke the Fifth Amendment and mandate that all questioning, including clarification inquiries, cease. However, this rule has been sufficiently muddled to provide little guidance to law enforcement on how to proceed when there is what they believe to be an ambiguous or equivocal response. In People v. Bestelmeyer, 166 Cal.App.3d 520, 527-528, 212 Cal.Rptr. 605, 608-609 (1985), where the suspect said "Maybe I shouldn't say anything without a lawyer . . . ." the California Court of Appeal used the substantial evidence test to uphold the trial court's finding that the suspect did not intend to invoke his rights. In In re Brian W., 125 Cal.App.3d 590, 594-599, 178 Cal.Rptr. 159, 161-166 (1981), when asked if he wished to give up

the right to remain silent the suspect replied "No." The detective asked a clarifying question because, in his experience, "no" in the context of the admonishment does not always mean a refusal to talk. The California Court of Appeal used the totality of the circumstances test to uphold the trial court's findings of waiver.

Other jurisdictions have joined the California Supreme Court in barring further questioning where the suspect has made any reference to counsel, no matter how equivocal. In Ochoa v. State, 573 S.W.2d 796, 799-801 (Tex.Crim.App. 1978), the suspect had made mention of wanting to talk with a lawyer, but was undecided about it. The Texas Court of Criminal Appeals, reading what it believed to be the mandate of Miranda, held that questioning had to cease at that point.

In contrast to those jurisdictions that

appear to exclude even clarification questions following an ambiguous or equivocal response to a waiver question, some jurisdictions impose a threshold standard of clarity for an invocation of Fifth Amendment rights. For example, in People v. Krueger, 82 Ill.2d 305, 311, 412 N.E.2d 537, 540 (1980), cert. denied 451 U.S. 1019 (1981), the Supreme Court of Illinois interpreted the language in Miranda that interrogation must cease if the suspect "indicates in any manner" that he wants to consult with an attorney. The Court concluded that the "in any manner" directive does not mean "that every reference to an attorney, no matter how vague, indecisive or ambiguous, should constitute an invocation of the right to counsel." The Court held that interrogating officers properly exercised their judgment in concluding that words to the effect of "Maybe I need a lawyer" was not an invocation.

The third approach, which finds support in some federal and state cases, avoids attributing a talismanic quality to the word "attorney" or any particular phrase. Rather, whenever a suspect makes an equivocal response to a waiver question, the scope of interrogation narrows to a single subject--clarification. Such limited inquiry must not itself be coercive. It must seek to discern, not persuade. (Thompson v. Wainwright, 601 F.2d 768, 771-772 (5th Cir. 1979); Nash v. Estelle, 597 F.2d. 513, 516-517 (5th Cir. 1979); State v. Moulds, 105 Idaho 880, 888, 673 P.2d 1074, 1082 (1983).)

Petitioner submits that the present state of the law is such that law enforcement has no clear standard for determining when an accused's response to a waiver question may be characterized as ambiguous or equivocal. Further, upon a finding of ambiguity or

equivocation, there is no clear standard for resolving the issue and determining the accused's desires. (See Smith v. Illinois, supra at pp. 99-100.)

B. Clarifying Questions Which Do Not Portend to Develop the Facts Under Investigation Should Not be Considered "Interrogation" Within the Meaning of Miranda v. Arizona

> "The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated." (Miranda v. Arizona, supra, at p. 478; emphasis added.)

"Interrogation" as a term of art used in Miranda and its progeny, contemplates an adversary system of criminal justice. (Id., at p. 477.) Police questions seeking substantive information about the matter under investigation constitute interrogation. Additionally, questions designed to persuade

the suspect to waive Fifth Amendment rights may be coercive, though not designed to seek substantive information. "Such measures are foreign to the purpose of clarification, which is not to persuade but to discern." (Thompson v. Wainwright, supra, 601 F.2d at p. 772.) However, narrow questions through which an officer seeks only to determine whether or not an ambiguous or equivocal response is an invocation should not be deemed "interrogation" within the meaning of the Miranda rule.

In the case before this Court, the investigating officer scrupulously limited his questions to the issue of clarification. He asked questions designed only to discern until he clearly understood that respondent's intent was not to invoke his Fifth Amendment rights. No substantive information about the crimes was sought until the waiver issue was clarified. Petitioner submits that this

Court needs to establish, as a clear rule of procedure, the sensible distinction between clarification and interrogation followed by some courts and rejected by others. (See United States v. Nielsen, 392 F.2d 849, 852-853 (7th Cir. 1968); People v. Turnage, 45 Cal.App.3d 201, 211, 119 Cal.Rptr. 237, 244 (1975).)

II

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHAT APPELLATE STANDARD OF REVIEW SHOULD BE APPLIED TO A TRIAL COURT'S FINDINGS THAT A SUSPECT'S RESPONSE FOLLOWING A MIRANDA ADMONITION WAS AMBIGUOUS AND WARRANTED CLARIFYING QUESTIONS

A. Where a Suspect's Response to a Waiver Question Following a Miranda Admonition Is Susceptible to More Than One Reasonable Interpretation, a Reviewing Court Should Defer to the Trial Court's Findings on the Suspect's Meaning and Intent

The federal appellate courts generally defer to the trial courts to evaluate equivocal acts and determine whether there was a waiver of Fifth Amendment rights. (See

Robinson v. United States, 448 A.2d 853, 854, fn. 2 (D.C.App. 1982); Taylor v. United States, 380 A.2d 989, 991-994 (D.C.App. 1977); United States v. McNeil, 433 F.2d 1109, 1112-1113 (D.C.Cir. 1969).) A trial court's determination that there was a voluntary waiver will not be overturned unless it is without substantial support in the record. (Taylor v. United States, supra, at p. 992.) This approach need not conflict with the rule, followed in California, that an appellate court may independently examine uncontradicted facts to resolve a Miranda question. (See People v. Jimenez, 21 Cal.3d 595, 609, 147 Cal.Rptr. 172, 180, 580, P.2d 672, 680 (1978).) A finding that an act or statement was equivocal or ambiguous necessarily requires more than a simple review of a cold transcript. As this Court alluded to in Smith v. Illinois, supra, at pages 99-100, when discussing issues not

reached by its opinion, events preceding the statement as well as nuances inherent therein may support a finding of ambiguity. Both the suspect's intent and the officer's credibility are at issue when, as in the instant case, a trial court evaluates the interview and has the benefit of the officer's in-court testimony regarding his perceptions and the totality of the circumstances surrounding the interrogation. "[O]nly the trier of fact can intelligently determine the import of the officer's statement." (Smith v. Illinois, supra, at p. 103 (Rehnquist, J., dissenting).) The Miranda Opinion impliedly recognized this by approving FBI procedures which leave resolution of an ambiguity up to the interviewing agent. (Miranda v. Arizona, supra, at pp. 483-486.)

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B. The Rule Established in the Opinion Below Is a Departure From Reasonable Standards of Appellate Review

In the case before this Court, the trial court found that respondent's statement that he had nothing to say supported "the proposition that he wasn't prepared to give some sort of a narrative statement of his activities, and he didn't." (R.T. p. 345.) It was not found to be an invocation of his Miranda rights; indeed just the opposite was true because, when asked directly if he would answer questions, respondent replied "It all depends on the questions."

The California Court of Appeal, invoking the power of independent review, stated:

> "Although the trial court expressly determined to the contrary on the basis of the 'clarification' rule, it seems difficult, if not impossible, to square appellant's [respondent's] emphatic unwillingness to say anything with other

than an invocation of the right to remain silent." (People v. Carey, 183 Cal.App.3d 99, 104, 227 Cal.Rptr. 813, 815 (1986).)

This ignores the trial court's findings, which were supported by substantial evidence. Unlike Smith v. Illinois, supra, or Edwards v. Arizona, 451 U.S. 477, 484-485 (1981), where a "bright line" prophylactic rule barred further questioning following a clear request for counsel, respondent's answers were anything but clear. His answers were non-responsive. Although no particular words are necessary to invoke the Fifth Amendment, nothing in respondent's answers mandated the conclusion that he was refusing to answer questions. Yet, the opinion below suggests that that was the only conclusion the trial court could have reached. Petitioner submits that, as this Court suggested in Smith v. Illinois, supra, a better rule allows the

trial court to resolve ambiguities based on nuances and the totality of the circumstances surrounding the interview.

III

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE SUBSTANTIAL FEDERAL QUESTION OF WHETHER THE MIRANDA EXCLUSIONARY RULE SHOULD BE APPLIED WHERE AN UNCOERCED STATEMENT IS OBTAINED FOLLOWING AN OFFICER'S GOOD FAITH, BUT MISTAKEN, BELIEF THAT A SUSPECT HAS PROPERLY WAIVED HIS FIFTH AMENDMENTS RIGHTS

A. When an Officer Mistakenly, But in Good Faith, Believes That a Suspect's Response to a Miranda Waiver Question is Ambiguous or Equivocal, Further Clarifying Questions Do Not Offend the Fifth Amendment

As previously noted, the Court below refused to apply the clarification rule, finding that ambiguity was a necessary precedent and that respondent's answers were not ambiguous. However, the Court acknowledged the officer's good faith belief that the responses were ambiguous and required clarification. Petitioner submits that where there has been a judicial finding

that an officer acted in good faith in proceeding to ask clarification questions, statements obtained following clarification and waiver of rights are properly received. Even if, assuming arguendo, there is a technical Miranda violation, uncoerced statements should be admitted in evidence.

It is well-settled that the procedural safeguards outlined in Miranda v. Arizona, supra, are not themselves rights protected by the Constitution. (See discussion in Oregon v. Elstad, 470, U.S. 298, 304-314 (1986), and Michigan v. Tucker, 417 U.S. 433, 444 (1974).) The Miranda exclusionary rule serves the twin purposes of deterring unlawful police conduct and protecting the courts from reliance on untrustworthy evidence. (Michigan v. Tucker, supra, at pp. 446-448; Harris v. New York, 401 U.S. 222, 225 (1971).) Neither purpose is served by excluding the statements obtained in the

instant case. As Justice Rehnquist noted, writing for the Court in Michigan v. Tucker, supra, at page 447:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful or at the very least negligent conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

Given the fact that clarification questions are proper following a truly ambiguous or equivocal response to a waiver question, no

officer would be deterred by excluding statements obtained following good faith adherence to his perceived clarification duty.

Similarly, the purpose of excluding untrustworthy evidence is unaffected by a good faith exception to the Miranda exclusionary rule. Courts must still independently determine whether, based on the totality of the circumstances, the statements were impermissibly compelled. Thus, for example, an officer might not be permitted to badger a suspect with "clarification" questions until the suspect's free will was overborne. However, that analysis involves traditional Fifth Amendment considerations and is distinct from the question of whether Miranda's procedural safeguards have been violated.

Chief Justice Burger, dissenting in

Brewer v. Williams, 430 U.S. 387, 420-429 (1977), eloquently identified the errors in a policy of mechanically applying the exclusionary rule in a situation where none of its conceivable goals would be furthered. Reliable evidence is excluded, the truth-seeking process is not furthered, and all in the name of protecting a constitutional right which was never violated in the first place.

B. Application of a Good Faith Test to the Instant Facts Underscores the Conclusion That the Opinion Below Impermissibley Extends Miranda v. Arizona Beyond Its Doctrinal Moorings

A state court can neither add to nor subtract from the mandates of the United States Constitution. (North Carolina v. Butler, 441 U.S. 369, 376 (1979).) The opinion below, based entirely on federal

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law,[4/] mandates exclusion of statements without a finding that they were compelled in violation of the Fifth Amendment and in spite of a finding that the interrogating officer operated under the good faith belief that proper precedural safeguards were being followed. It serves none of the purposes of the Miranda exclusionary rule.

In deciding whether to exercise its certiorari jurisdiction, this Court has generally sought "to contain Miranda to the express terms and logic of the original opinion." (Fare v. Michael C., supra, 439 U.S. 1310, 1315 (1978) (Rehnquist, J., in chambers).) Miranda v. Arizona was written

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4. The opinion below was based solely on an interpretation of the Federal Constitution and Miranda v. Arizona, supra. There are no references to state statutory or constitutional grounds in support of the holding except to the extent that state cases, which are themselves applications of Miranda and the Federal Constitution, are mentioned.

to function as an effective sanction to a constitutional right, assuring proper police conduct and trustworthy evidence. When, as here, application of the exclusionary rule serves neither purpose, the balance of interests should tip in favor of "making available to the trier of fact all concededly relevant and trustworthy evidence . . . ." (Michigan v. Tucker, supra, at p. 450.)

In the instant case, the statements obtained from respondent were not garnered in violation of any Fifth Amendment protection. The trial court properly admitted them. Petitioner submits that this Court should grant a writ of certiorari to consider application of a good faith test where, as here, an officer acts in good faith and the statements received are not coerced or compelled.

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CONCLUSION

For these various reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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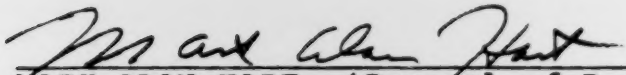

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December 9, 1986.

A P P E N D I X

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	2d Crim.
	)	(Super.
vs.	)	Ct.No.
	)	155356
LEON CARNAL CAREY,	)	(Santa
	)	Barbara
Defendant and Appellant.	)	County)
	)	

In this case, we hold that the police may not "clarify" unambiguous and repeated refusals to say anything after a custodial suspect has been advised of and indicates that he understands his constitutional rights pursuant to Miranda v. Arizona (1966) 384 U.S. 436.

Leon Carnal Carey was convicted in a court trial of a plethora of serious offenses which resulted in a determinate state prison

sentence of 25 years 8 months.[1/]
He appeals, contending: "The trial court erred in denying appellant's motion to suppress his confession." The contention is meritorious and the judgment must be

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1. Appellant was, in essence, a one man crime wave in Santa Barbara between February and April of 1985. The crimes for which he was convicted are as follows: count I, attempted burglary of a residence; count II, receiving stolen property; count III, burglary of a residence; count IV, forcible rape; count V, forcible rape with a foreign object; count VI, forcible oral copulation; count VII, robbery in a dwelling; count X, felonious assault with infliction of great bodily injury; count XIII, robbery; count XIV, attempted burglary of a residence; count XV, grand theft from the person of another.

reversed.[2/]

Over 20 years ago, our United States Supreme Court, in the landmark decision of Miranda v. Arizona, supra, 384 U.S. 436, said, "[o]nce warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation

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2. "It is settled that the introduction of a confession obtained in violation of constitutional guarantees is prejudicial per se and that a conviction based on such a confession must be reversed. [Citation.]" (People v. Mattson (1984) 37 Cal.3d 85, 91.) The People introduced appellant's statements which were full blown confessions or admissions virtually tantamount thereto, as to all of the offenses for which he was convicted. We hasten to observe that even without the tape recorded statements, People's exhibit No. 35, the prosecution may well be able to once again secure a conviction on one or more counts.

Paraphrased, the philosophical observations of Division Two of the Second Appellate District are here apposite: "'It should always be borne in mind that the

must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." (At pp. 473-474.) The court also indicated that where the person to be interrogated ". . . is indecisive in his request for counsel, there may be some question on whether he did or did not waive

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constitutional proscription against [Fifth Amendment compelled disclosure], and the judicial rules promulgated in support thereof, are designed to protect the innocent citizen, not the criminal. It is true, of course, that only the guilty profit directly from the exclusionary rule. However, it is assumed that over the long run the law abiding members of society will benefit from that curtailment of excessive police conduct that it is hoped will result from the application of such rule. In essence, the criminal is but an unavoidable "third party beneficiary" of the compact effected between the governed and their government . . . .'" (People v. Bellomo (1984) 157 Cal.App.3d 193, 197, emphasis in original; People v. Lara (1980) 108 cal.app.3d 237, 241.)

counsel. Situations of this kind must necessarily be left to the judgment of the interviewing Agent . . . . Because of the constitutional basis of the right, however, the standard for waiver is necessarily high. And, of course, the ultimate responsibility for resolving this constitutional question lies with the courts." (At pp. 485-486, fn. 55.) This latter rule has spawned a growing body of California law permitting the police to "clarify" whether or not a suspect comprehends or waives his Miranda rights. (E.g., People v. Turnage (1975) 45 Cal.App.3d 201, 211; People v. Maynarich (1978) 83 Cal.App.3d 476, 481; In re Brian W., (1981) 125 Cal.App.3d 590, 598-600; People v. Russo (1983) 148 Cal.App.3d 1172, 1177; People v. Bestelmeyer (1985) 166 Cal.App.3d 520, 526-528.) This principle is perhaps best phrased as follows: "[T]he case law draws a

sensible distinction between clarification and interrogation. On the one hand, it permits clarifying questions with regard to the individual's comprehension of his constitutional rights or the waiver of them; on the other hand, it prohibits substantive questions which portend to develop the facts under investigation . . . ." (People v. Turnage, supra, at p. 211, emphasis in original.)

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The "clarification rule," however, requires ambiguity as a precedent which is not here present.3/ In the instant case, within minutes of the commission of the

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3. Our Supreme Court has said "[t]o strictly limit the manner in which a suspect may assert the privilege, or to demand that it be invoked with unmistakable clarity (resolving any ambiguity against the defendant) would subvert Miranda's prophylactic intent." (People v. Randall (1970) 1 Cal.3d 948, 955.) "'Ambiguous statements are to be construed as invocations. . . .'" (People v. Hinds (1984) 154 Cal.App.3d 222, 235; People v. Russo, supra, 148 Cal.App.3d 1172, 1177; People v. Duran (1983) 140 Cal.App.3d 485, 492.) While People v. Turnage, supra, speaks in terms of "clarification" concerning comprehension or waiver of Miranda rights, it is conspicuously silent on invocation. We need not delve into this intellectual thicket since, as indicated, here there is no ambiguity to clarify.

offense, appellant was taken into custody and advised by Detective Neil Sharpe of the Santa Barbara Police Department that he was under arrest for robbery. Detective Sharpe detailed the specifics of the robbery, told appellant that he wanted to hear his explanation, and advised him of the salient rights pursuant to Miranda v. Arizona, supra. When asked whether he understood each of his rights, appellant said, "Yes." The following then transpired:

> DETECTIVE SHARPE: "Having these rights in mind, do you wish to talk to me now?"
>
> APPELLANT: "I ain't got nothin' to say."
>
> DETECTIVE SHARPE: "Is that, you don't know what to say or you'll answer some question of mine?"
>
> APPELLANT: "I ain't got nothin' to say at all."

DETECTIVE SHARPE: "I don't understand, I mean, saying you have nothing to say."

APPELLANT: "I ain't got nothin' to say, nothin', nothin'."

DETECTIVE SHARPE: "You don't want to say anything?"

APPELLANT: "I ain't got nothin' to say."

DETECTIVE SHARPE: "How about if I asked you questions? Would you have some response to those?"

APPELLANT: "It all depends on the questions."

DETECTIVE SHARPE: "Okay, then why don't you answer the questions you can and the ones you can't, allright? [Sic.]"

Without any express waiver of his Miranda rights, Detective Sharpe commenced his substantive interrogation which

culminated in appellant virtually confessing to all of the charged offenses.[4/]

Although the trial court expressly determined to the contrary on the basis of the "clarification" rule, it seems difficult, if not impossible, to square appellant's emphatic unwillingness to say anything with other than an invocation of the right to remain silent. "Where [as here] there is no conflict in the evidence, there is no requirement that the reviewing court view [a Miranda ruling] in the light most favorable to upholding the trial court's determination. [Citations.]" (People v. Duren (1973) 9 Cal.3d 218, 238.) In this case, the trial court's ruling was erroneous as a matter of

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4. No transcript of the subject interrogation was introduced into evidence. We have, on our own motion, ordered the tape recordings transmitted to this court and have listened to them. (Cal. Rules of Court, rules 10(d) and 35(e).) We emphasize that our decision today is not based upon waiver principles.

law; and were we to sanction the police procedures here challenged, the "clarification" exception would swallow the Miranda rule.

We do not disparage appellant for his economy of words or lack of eloquence. Although he was no stranger to the justice system, appellant was not chargeable with the duty of uttering the talismanic incantation: "I hereby invoke my constitutional rights pursuant to the United States Supreme Court decision in Miranda v. Arizona." There is no such requirement and pursuant to Miranda v. Arizona, and its progeny (e.g., People v. Hayes (1985) 38 Cal.3d 780, 784), it is well settled the "'. . . desire to halt the interrogation may be indicated in a variety of ways . . . .'" (Ibid.) As aptly phrased by Presiding Justice Lillie, "[i]s there more defendant must say to invoke his privilege to remain silent than 'No' when asked to explain All.

or clarify or continue the conversation?" (People v. Marshall (1974) 41 Cal.App.3d 129, 134.) We similarly ask, how many times must a defendant exclaim, "I ain't got nothin' to say" to invoke his privilege to remain silent?

Here, appellant's quadruple invocation of the right to remain silent was consistent with the "in any manner" test promulgated by the United States and California Supreme Courts. Phrased otherwise, "[a]ny words or conduct which 'reasonably appears inconsistent with a present willingness on the part of the suspect to discuss his case freely and completely with police at that time [fn. omitted]' [citation] must be held to amount to an invocation of the Fifth Amendment privilege." (People v. Burton (1971) 6 Cal.3d 375, 382, emphasis in original; see also, e.g., People v. Russo, supra, 148 Cal.App.3d 1172, 1176.)

Questioning should have ceased when appellant said, "I ain't got nothin' to say . . ." the first time. A fourfold repetition not only reasonably appears inconsistent with a present willingness on the part of appellant to discuss his case freely and completely with Detective Sharpe at that time, it is

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only inconsistent therewith.[5/]

These constitutional principles have the United States Supreme Court's imprimatur in Smith v. Illinois (1984) 469 U.S. ___ [83 L.Ed.2d 488, 495, 105 S.Ct. ___] where, in the context of whether there was an

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5. Detective Sharpe was emphatic about his perceived "clarification" duty. At the renewed hearing on the motion to exlude the confession, the following transpired:

"Q. [Defense counsel]. You did not understand what he meant when he said, 'I got nothing to say'

"A. [Detective Sharpe]. That's correct.

"Q. You didn't understand it the second time he said it?

"A. No.

"Q. And he might have said it a third or fourth time?

"A. I believe he said it a third time.

"Q. You didn't understand what he meant then?

"A. No."

invocation of the right to counsel, vel non, the court indicated: "Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease. In these circumstances, an accused's subsequent statements are relevant only to the questions whether the accused waived the right he had invoked. Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together." (Emphasis added.) This holding is apposite to an invocation of the Fifth Amendment privilege and renders appellant's subsequent willingness to answer specific questions irrelevant on the issue of invocation. "[A]n accused's subsequent statements are relevant only to the question whether the accused waived the right he had invoked. . . ." (Ibid.) "'No authority, and no logic,

permits the interrogator to proceed . . . on his own terms and as if the defendant had requested nothing, in the hope that the defendant might be induced to say something casting retrospective doubt on his initial statement that he [did not wish] to speak . . . .' [Citation.]" (Id., at p. 496.) This is exactly what Detective Sharpe did and is exactly what the police are not permitted to do.

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The judgment is reversed.

CERTIFIED FOR PUBLICATION.

YEGAN, J.*

We concur:

GILBERT, Acting P.J.
ABBE, J.

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*Assigned by the Chairperson of the Judicial Council

William L. Gordon, Judge
Superior Court County of
Santa Barbara

F. Elaine Easley, under appointment by the Court of Appeal, for Defendant and Appellant.
John K. Van de Kamp, Attorney General, Donald E. deNicola, Mark Alan Hart, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL
2nd District, Division 6, No. B017051

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

I N B A N K

PEOPLE

v.

LEON CARNAL CAREY

Respondent's petition for review DENIED.

'BIRD'
Chief Justice

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

NO. 86-976

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LEON CARNAL CAREY,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

OPPOSITION TO PETITION FOR CERTIORARI

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OPPOSITION TO PETITION FOR CERTIORARI

I

CERTIORARI SHOULD NOT BE GRANTED TO RESOLVE CONFLICT OVER THE APPROPRIATE RESPONSE TO AMBIGUOUS INVOCATIONS, AS THAT ISSUE WAS NOT IN DISPUTE BETWEEN THE PARTIES HERE.

Petitioner contends first that the writ should be granted in order to resolve conflict among jurisdictions as to the appropriate response to ambiguous invocations by a suspect of the right to silence (Petition, pp. 10-22). In the instant case, however, all parties adhered to the California courts' position on this issue: that police officers may ask questions to clarify an ambiguous invocation of the right by a suspect. People v. Turnage (1975) 45 Cal.App.3d 201 (see the opinion below, Petition, Appendix, p. 5).

As the propriety of this approach to ambiguous invocation was not raised by any party below, the record in the instant case would be singularly unhelpful in any effort to compare its merits to those of approaches taken by other jurisdictions.

II

CERTIORARI SHOULD NOT BE GRANTED HERE TO DETERMINE BY WHAT STANDARD OF REVIEW ON APPEAL FINDINGS OF AMBIGUITY SHOULD BE TESTED, AS IT IS CLEAR THAT THE COURT BELOW APPLIED THE ONLY PLAUSIBLE STANDARD: THE STANDARD OF SUBSTANTIAL EVIDENCE.

Petitioner asserts that the California Court of Appeal struck down the trial court's finding of ambiguity in spite of the fact that it was supported by substantial evidence. On the basis of this assertion, Petitioner goes on to conclude that the Court of Appeal must have used some standard of review other than substantial evidence (Petition, p. 26).

This is simply not the case. Petitioner presents no basis for believing that there is any dissent among jurisdictions from the use of the substantial evidence test for this purpose. Nor does Petitioner establish that the Court of Appeal here departed from that standard.

It is, in fact, clear from the opinion below that the Court of Appeal considered the whole record, including all "nuances and the totality of the circumstances surrounding the interview" (Petition, p. 27) and found that there was no substantial evidence to support a finding of ambiguity.

That the Court of Appeal considered all of the evidence can be seen from the fact that the court ordered the tape recordings of the interrogation transmitted to it, and listened to them (Petition, Appendix, p. 10, f.n. 4). The court concluded on the basis of its review of this tape, which established an undisputed factual record, that "the trial court's ruling [finding ambiguity] was erroneous as a matter of law" (Petition, Appendix, pp. 10-11).

It is hard to believe that anyone could come to another conclusion on the basis of this record. In response to a request for a waiver of his right to silence, respondent four times said, "I ain't got nothin' to say", once expanding the phrase to "nothin' at all", and once adding, "nothin', nothin' (Petition, Appendix, pp. 10-11)." As the Court of Appeal asked: "[H]ow many times must a defendant exclaim, "I ain't got nothin' to say" to invoke his privilege to remain silent? (Petition, Appendix, pp. 10-11)."

Aside from any other consideration, it would simply be ludicrous for the Court to deal with the recurring and difficult questions relating to ambiguous invocations of the right to silence in a case involving such a monumental lack of ambiguity.

III

AS THE ISSUE OF THE APPLICATION OF A GOOD FAITH EXCEPTION TO THE

REQUIREMENTS OF MIRANDA WAS NOT RAISED IN THE COURTS OF CALIFORNIA, AND PARTICULARLY AS CALIFORNIA PROCEDURE PROHIBITS THE RAISING OF THIS ISSUE FOR THE FIRST TIME ON APPEAL, IT CANNOT BE RAISED FOR THE FIRST TIME BEFORE THIS COURT.

In its Petition for Certiorari to this Court, petitioner for the first time argues that a good faith exception to the requirements of Miranda v. Arizona, 384 U.S. 436 (1966) should be fashioned for officers who erroneously find ambiguity in invocations of the right to silence, and that the new-minted exception should be applied here (Petition, pp. 27-33).

There are two insuperable barriers to the presentation of this issue here.

First, this Court has long held that it has no jurisdiction to deal with questions which have not been first presented to the state courts for resolution. Hill v. California (1971) 401 U.S. 797, 805-06. The issue of good faith was never raised below.

Petitioner implies that there was "a judicial finding that an officer acted in good faith" below (Petition, pp.27-28). This is disingenuous. A review of the Reporter's Transcript of the hearing in the trial court reveals that the issue of good faith was neither raised by petitioner nor ruled upon by the trial judge (RT 19-24).

Nor was the issue of good faith raised in the Court of Appeal. Though petitioner states that the Court of Appeal "acknowledged the officer's good faith belief" in its opinion (Petition, p. 27), the assertion is simply untrue. The passage to which petitioner refers is no more than a footnote in which the court commented that "Detective Sharpe was emphatic about his perceived 'clarification' duty (Petition, Appendix, p. 14, f.n. 5)." Whatever else can be said about this clearly ironic remark, with its inverted commas around the word "clarification", it cannot be taken seriously as an acknowledgement of the officer's good faith.

The closest petitioner came to raising the good faith

question was in its Petition for Review to the California Supreme Court. In that petition, petitioner did argue that the interrogating officer's "subjective belief" should have been given some indeterminate amount of weight in deciding whether the invocation was ambiguous (pp.13-16). But this by no means offered the California Supreme Court an opportunity to deal with the momentous question of the creation of a new good faith exception to the Miranda requirements, the question which petitioner now presents to this Court.

Secondly, this Court will not deal with a question which the petitioner has failed to raise below in accordance with adequate state procedure. As this Court has held, state procedural doctrines "are no less applicable when Federal rights are in controversy than when the case turns entirely upon question of local or general law." John v. Paullin (1913) 231 U.S. 583, 585; Wolfe v. State of North Dakota, 364 U.S. 177, 194-95 (1960).

The courts of California have held that where the issue of good faith requires a consideration of the facts, it may not be first raised on appeal: any appellate consideration must be based on a prior factual finding by the trial court. Higgason v. Superior Court, 170 Cal.App.3d 929, 941-42 (1985).

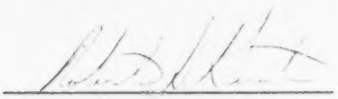
In the instant case, as the trial court determined for itself that the invocation was ambiguous (RT 23-24), there was no reason to examine the officer with regard to his good faith, and no such effort was undertaken. The trial court record is thus devoid of any consideration of the officer's good faith.

As petitioner was precluded from raising this issue in the appellate courts of California under Higgason v. Superior Court, 170 Cal.App.3d 929, 941-42, supra, and made no effort to do so, it is precluded from raising it here.

CONCLUSION

For the reasons stated above, this case is an extraordinarily inapt one to use as the vehicle for consideration

of the weighty issues with which petitioner wishes this court to deal, and the Petition should therefore be denied.



ROBERT S. GERSTEIN

NO. 86-976

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

LEON CARNAL CAREY,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the United States Supreme Court and that I have on this date served a copy of the attached motion for Leave to Proceed in Forma Pauperis and Opposition to Petition for Writ of Certiorari by depositing the above in the United States Mail, postage prepaid and properly addressed to:

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Dated this ____ day of _____, 1987, at Los Angeles, California.

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